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79-1629

In the Supreme Court of the United States

October Term, 1979

No. 79-.....

BOARD OF EDUCATION OF THE MEMPHIS CITY SCHOOLS, et al.,
Petitioners,

vs.

DEBORAH A. NORTHCROSS, et al.,
Respondents,

and

CITY OF MEMPHIS, et al.,
Additional Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on November 23, 1979, a petition for rehearing having been denied on January 17, 1980.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 611 F.2d 624 and is reprinted in the Appendix, *infra*, at pages 1-A through 39-A. The District Court has issued three unreported Decisions which are the subject of this appeal. These are the District Court's "Ruling On The Application Of The Plaintiffs For Attorneys' Fees" dated March 24, 1976, and reprinted in the Appendix, *infra*, pages 40-A through 52-A; the "Award On Application Of The Plaintiffs For Attorneys' Fees" entered November 4, 1977, and reprinted in the Appendix, *infra*, pages 53-A through 62-A; and the "Ruling On Application For Attorneys' Fees And Expenses For May, 1977 Hearing" entered August 1, 1978, and reproduced in the Appendix, *infra*, pages 63-A through 74-A.

Prior reported Opinions in this matter are found at 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); 333 F.2d 661 (6th Cir. 1964); 420 F.2d 546 (6th Cir. 1969); 420 F.2d 548 (6th Cir.), *remanded*, 397 U.S. 232 (1970); 312 F. Supp. 1150 (W.D. Tenn. 1970), *remanded*, 444 F.2d 1179 (6th Cir. 1971); 444 F.2d 1184 (6th Cir. 1971); 341 F. Supp. 583 (W.D. Tenn.), *vacation of stay denied*, 463 F.2d 329 (6th Cir.), *remanded*, 466 F.2d 890 (6th Cir.), *stay denied*, 309 U.S. 909 (1972), *cert. denied*, 410 U.S. 926 (1973), *vacated in part and remanded on other grounds*, 412 U.S. 429 (1973), and 489 F.2d 15 and 19, *cert. denied*, 416 U.S. 962 (1974).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The Judgment of the Court of Appeals was entered on November 23, 1979, and the Petition for Rehearing was denied on January 17, 1980.

QUESTIONS PRESENTED

1. In awarding an attorney's fee pursuant to 20 U.S.C. §1617 or 42 U.S.C. §1988, does a District Court retain its equitable discretion to reduce the award based on a finding that there were numerous issues on which plaintiffs did not prevail and that a high proportion of the hours claimed related to unnecessary services?

2. Does a District Court, in assessing such an award of attorneys' fees, have the authority to weigh the hours and hourly rates claimed against the Court's own knowledge of the case and expertise in determining fees?

3. Did the Court of Appeals, having enunciated a different standard for the exclusion of hours from that applied by the District Court, err in entering a final fee award rather than giving the District Court an opportunity to apply the new standard in light of its knowledge of the case, since:

   (a) There was no transcript of the 1977 Hearing on which the award was based, and the Court of Appeals was, therefore, in no position to determine whether or not the District Court would find some services to be unreasonable as well as unnecessary;

   (b) Without benefit of the record, the Court of Appeals found it necessary to make a priori judg-

ments as to the proper hourly rate for one of plaintiffs' attorneys and as to a proper percentage reduction for duplication of services?

4. Did the Court of Appeals err in holding that the District Court was obligated to award a fee for portions of the case occurring more than three years and up to eight years prior to the first filing of any application for a fee in this cause, and under circumstances where the District Court had found such a fee would be unjust?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the application of two statutes providing for attorneys' fees to prevailing plaintiffs in civil rights matters:

20 U.S.C §1617. *Attorney Fees*

"Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof), or the United States (or any agency thereof), for failure to comply with any provision of this chapter or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

42 U.S.C. §1988. *Proceedings in vindication of civil rights*

". . . In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

This petition for writ of certiorari seeks to have the Supreme Court review a Decision of the United States Court of Appeals for the Sixth Circuit relating to the proper standards for determination of attorneys' fees in desegregation cases.

History of the Litigation

This case involves two separate awards of attorneys' fees against the petitioner, Memphis Board of Education. In the main portion of this case, the respondents seek a fee for services dating back to the original filing of this lawsuit in 1960. In this same portion of the case, an additional fee is sought against the added defendant, City of Memphis, based on several proceedings in which the Board of Education and the plaintiffs enjoined the City of Memphis from interference with the plan of desegregation. This was consolidated with an appeal from the District Court's subsequent award of attorneys' fees in a later hearing held in May, 1977.

The plaintiffs' original request for attorneys' fees in this cause was filed on August 1, 1974, following the adoption of a final plan of desegregation implemented at the

beginning of the 1973-4 school year. The 1977 hearing, which was the subject of a separate award, grew out of three motions brought by the Board of Education and consolidated for trial by the District Court. These motions related to (1) the Board's request for leave to renovate Westwood High School; (2) the Board's request for certain attendance modifications coupled with three school closings; (3) the Board's request for leave to implement certain optional school programs. At the conclusion of the hearing, the District Court reached a mixed result in which a majority of the Board's requests were rejected, but several of the attendance modifications, closings, and optional schools were approved over the plaintiffs' objections. The only one of the three motions to be totally resolved in favor of the position of either party was the motion for leave to renovate Westwood High School as opposed to the plaintiffs' requests that a new high school be constructed. The District Court, however, directed that a fee should be awarded the plaintiffs for this hearing, and this direction resulted in a separate fee award involved in the present petition.

Proceedings in the District Court

The District Court filed two separate Opinions in regard to the main award of fees in this case. With the approval of all parties, it was determined to have the District Court rule first on the general time periods and types of services which would be subject to a fee award. In that ruling, the District Court dealt with questions relating to the proper effect to be given 20 U.S.C. §1617 in relation to a fee application which was not pending at the time of that enactment. The District Court also addressed itself to the contention of the Board that the claim for fee should be reduced or eliminated on the basis of the numerous unnecessary positions which had been

taken by the plaintiffs throughout the litigation prolonging the lawsuit and requiring separate motions and hearings which otherwise would have been unnecessary. These included the plaintiffs' unsuccessful opposition to the final plan of desegregation - an opposition which necessitated an entirely separate hearing in April, 1973, at a time when the Board had filed a "Statement of Position" expressly seeking to have that same final plan adopted by the District Court. They also included an unsuccessful effort to cite the Board of Education for contempt; unsuccessful oppositions to construction requests; prolonged insistence on plans involving unfeasible times and distances of transportation; and unreasonable insistence on mid-semester implementation of the original busing plan.

Faced with this record, the District Court determined that it would not deny a fee in toto, but that the ultimate fee would be reduced to account for the plaintiffs' rejected assertions which prolonged or delayed the overall proceeding. With regard to timeliness, the District Court distinguished *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), on the grounds that the application for attorneys' fees was not pending at the time the attorneys' fee statute was enacted. The District Court, therefore, held that it would award an attorneys' fee under 20 U.S.C. §1617 beginning with the effective date of the statute on July 1, 1972, and that it would award a partial fee on grounds of obstinancy for services commencing with the date of the decision of *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The District Court further held that an award of fees prior to that time would be unjust in view of the "lack of specific guidelines and the resulting trial and error experimentation" which prevailed prior to the *Swann* decision and in light of the delay of the plaintiffs in filing a fee petition in 1974 seeking recovery over a fourteen-year period. The District Court

also determined that it would grant a separate award against the City of Memphis based on the injunction proceedings in which the City had been made an additional defendant.

After submission of detailed briefs and affidavits, the District Court filed a further Decision on November 4, 1977, granting an award on the basis of the principles laid down in its earlier ruling. The plaintiffs were awarded fees for hearings in November, 1971, and March, 1972, which led up to the busing plan, but these fees were discounted by 50 per cent on the basis of the District Court's finding that the alleged "obstinance" of the Board of Education was only partially responsible for the hearings. The plaintiffs also received a partial award for the April, 1973, hearing which approved the final plan of desegregation proposed by the Board. This award was made pursuant to 20 U.S.C. §1617 and was discounted by 50 per cent to allow for the fact that the Board's position was entirely sustained as a result of the hearing and that the plaintiffs' proposed plan did not prevail. The Court's award also included allowances for expenses and a fee against the City of Memphis resulting in a total award of $28,600 in fees and $8,007.31 in expenses against the Board of Education. A total of $6,930.00 in fees and $323.26 in expenses was assessed against the City of Memphis.

On July 7, 1978, the District Court ruled on the issue of costs and attorneys' fees for the separate 1977 hearing. Noting that one of the three motions at issue had been resolved entirely in favor of the Board of Education and that there had been a mixture of results on the other two motions, the Court allowed a 20 per cent discount of the hours claimed as an adjustment based on the non-prevailing positions taken by the plaintiffs. After this adjustment, a total fee of $8,382.00 together with expenses of $5,200.16 was awarded against the Board of Education.

Proceedings in the Court of Appeals for the Sixth Circuit

On appeal, both decisions of the District Court were reversed. The Court of Appeals grounded its Ruling on the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. §1988, and held that that statute should be applied retroactively at least to the portion of the case going back to 1968. In spite of the plain language of the Act to the effect that the District Court "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs", the Court of Appeals read the Act as depriving the District Court of its historical equitable powers in determining an adequate fee:

> "We begin our discussion of this statute by pointing out that in making fee awards in Civil Rights cases today, Courts are no longer applying their historical equitable powers to devise an adequate remedy."

Having made this determination, the Court of Appeals then held that the District Court lacked authority to discount the plaintiffs' fees on the basis of the large number of unnecessary and non-prevailing issues raised by the plaintiffs. It further rejected the District Court's finding that the lateness of the plaintiffs in applying for a fee and the extreme uncertainty of the law prior to the decision in *Swann, supra*, were equitable considerations which could be applied by the District Court.

The major portion of the case was remanded to the District Court for a recalculation of the fee based on the instructions of the Court of Appeals. The Court of Appeals, however, undertook to enter a final judgment as to the May, 1977, hearing. In doing so, it set aside the District Court's 20 per cent reduction in hours claimed on the grounds that the District Court erred in considering the

extent of the issues on which the plaintiffs failed to prevail. It substituted a 5 per cent reduction based on duplication of services but granted a 10 per cent upward adjustment in the regular hourly rates on the basis of the allegedly contingent nature of the compensation. The Court of Appeals also rejected the District Court's finding that $75.00 per hour was reasonable compensation for lead counsel. The Court of Appeals substituted its own judgment for that of the District Court, allowing lead counsel the claimed $125.00 base hourly rate for courtroom time, but finding on its own judgment that this claim was excessive for office hours. The Court of Appeals arrived at an a priori figure of $82.50 per hour for office time of lead counsel, instead of the District Court's $75.00 per hour. It is noteworthy that all of these determinations were made in the absence of any transcript of the May, 1977, proceedings. Since this hearing had not been appealed by either party, the transcript had never been written, and the Court of Appeals had no independent means of evaluating the issues and results of that hearing.

Based on this approach, the Court of Appeals directed entry of a final judgment in the amount of $22,604.02 as fees, costs and expenses for the 1977 hearing, as opposed to the $13,582.16 awarded by the District Court.

REASONS FOR GRANTING WRIT

Petitioners submit that the present case involves issues of great importance regarding the proper standards for assessing attorneys' fees in desegregation cases and in other civil rights cases. As noted by the dissent in the Court of Appeals, there are many pending cases to which the standards enunciated in the Court of Appeals decision will be applied. Since the Court of Appeals for the Sixth Circuit has adopted a distinctly different approach from the other

circuits, it is appropriate for this Court to enunciate a nationwide standard.

The Split Among the Lower Courts Regarding Non-Prevailing Issues

The Opinion below flatly rejected the District Court's reduction of hours based on the high proportion of issues as to which the plaintiffs did not prevail. It did so based on its conclusion that 42 U.S.C. §1988 has eliminated the equitable powers of the District Court to devise an adequate remedy. In reaching this conclusion, the Decision below is squarely at odds with the Decision of the Court of Appeals for the First Circuit in *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978). There the Court held that:

> "Given the legislative history and case law cited above, we conclude that plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit. *However, the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful.*" (Emphasis added). 581 F.2d at 278.

The same approach has been adopted by numerous other courts in the context of fees under the 1964 Civil Rights Act. These cases are relevant in light of the legislative history of 42 U.S.C. §1988, indicating that "It is intended that the standards for awarding fees be generally the same as under the 1964 Civil Rights Act." 2 U.S. Code Cong. and Admin. News, p. 5912, Senate Rep. No. 94-1011. These cases include *Schaeffer v. Yellow Cab Co.*, 462 F.2d 1002 (9th Cir. 1972) in which the Court held:

> ". . . the amount of the award should also be proportionate to the extent to which the plaintiff prevails

in the suit. We believe that the district court should reconsider the award of attorney's fees in light of our decision that plaintiff is entitled to a small portion of the back pay claimed by her."

Perkins v. New Orleans Athletic Club, 429 F. Supp. 661 (E.D. La. 1976); and *Morton v. Charles County Board of Education*, 373 F. Supp. 394 (D.C. Md. 1974).

The Decision below is also most remarkable in light of the plain language of the attorney's fee statute. Far from suggesting that the statute is intended to restrict the broad equitable judgment of the District Court, the statute contains very plain discretionary language to the effect that ". . . The Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Right of the District Court to Weigh Hours and Hourly Rates Against Its Own Expertise

The Opinion below squarely departs from cases in other circuits in greatly restricting the ability of the District Court to assure fundamental fairness to a defendant. In *Johnson v. Georgia Highway Express*, 488 F.2d 714, at 717, it was acknowledged that the District Court must "weigh the hours claimed against [its] own knowledge, experience and expertise of the time required to complete similar activities." In the present case, the Court of Appeals has largely eliminated the District Court's power to apply its general expertise and has held that hours may be eliminated only on the basis of an itemized reply to the items set forth in plaintiffs' affidavits. It is difficult to see how a District Court, in adopting this approach, can deal with a claim in which it believes that the hours were generally excessive. In the present case, for example, the

District Court was presented with affidavits covering many hundreds of items occurring over a thirteen-year period. The practical effect of the Court of Appeals' Decision is to give these affidavits of admittedly estimated hours a disproportionately high importance and to restrict the independent expertise of the District Court. A District Court may very properly and correctly find that overall time spent in preparation of a particular lawsuit is excessive and yet be in no position to determine which particular conferences, witness interviews or hours spent in research are the ones to be deleted in conformity with the item-by-item approach envisioned by the Court of Appeals.

The Time Period Covered by the Award

An additional split among Courts of Appeals appears in the disregard of all time factors relating to the application for a fee which is seen in the Court of Appeals' Opinion in this case. The Court of Appeals set aside not only the District Court's construction of the attorney's fee statutes but also the District Court's express findings that equitable factors of extreme delay in filing and of previous flux and uncertainty of the law should eliminate some portions of the fee. The result is to require the District Court to award a fee for services occurring up to six years prior to the filing of the first application for fees in this case and to create the possibility that the District Court may award a fee for services rendered up to fourteen years prior to the filing of the petition. This is in contrast to the decision of *Wheeler v. Durham City Board of Education*, 585 F.2d 618 (4th Cir. 1978). In that case it was noted that "The accomplishment of a unitary system of schools in Durham and Durham County occurred in several discrete steps . . . ." The Court accordingly held that earlier phases of the case were not reopened for purposes of at-

torneys' fees by the subsequent passage of enabling legislation. As the Court observed,

> "But if a stage in the proceeding is final for the purpose of making a contemporaneous award of attorneys' fees, we think that it cannot also be pending so as to justify an award of attorneys' fees years after an order terminating that stage of the proceedings was entered. Of course, the reason why plaintiffs waited so long to assert their claim to fees is obvious. Until the enactment of §1617 in 1972, attorneys' fees were seldom awarded. Nonetheless, we do not think that §1617 authorizes an award of attorneys' fees after such a delay." 585 F.2d at 622-3.

In the present case, the Court of Appeals also makes an unfounded assumption in suggesting that there was no appropriate time for the plaintiffs to submit an application for attorneys' fees during the various stages of the disposition of their 1968 motion for further relief. This is inconsistent with the holding of *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974), in which it is held that plaintiffs are not bound to await the final outcome of the case but are free to make application upon the final disposition of interim matters. The plaintiffs have, accordingly, been able at all relevant times to submit an application for fees with respect to particular hearings and interim matters while these items are still fresh in the minds of the Court and the litigants and while it is not necessary to have subsequently-employed attorneys attempt to reconstruct the history of the case and to estimate hours spent on the basis of records going back over a decade and a half. As held in *U. S. v. Pinto*, 44 F.R.D. 357 (W.D. Mich. 1968), delay itself may become a bar to a petition for costs or fees even where there is no established court rule setting a definite time period.

Violation of Standards of Appellate Review

This case is also of importance in light of the violation by the Court of Appeals of the normal standards of appellate review. As envisioned by the Attorney's Fee Acts themselves, an award of attorney's fees should in the first instance be made by the District Court. Such an award should not be disturbed unless there is a clear abuse of discretion. See, for example, *Culpepper v. Reynolds Metals Co.*, 422 F.2d 1078 (5th Cir. 1971). In the present case, the Court of Appeals failed to give the District Court the opportunity to weigh the award for the May, 1977, hearing in light of the principles being enunciated in the decision. Without the benefit of the transcript of that hearing, it undertook to make a final award in the case. This deprived the District Court of the possibility of finding the services which it had eliminated as non-prevailing and unnecessary might also be eliminated under the new standard of "unreasonable" services being enunciated by the Court of Appeals. Certainly the Court of Appeals was in no position to pre-judge the disposition which the District Court might make of this issue.

This entry of a final decision also resulted in a remarkable series of a priori judgments by the Court of Appeals. These involved an estimation of the proper percentage allowance for contingency factors, for duplication of attorneys' services, and even for the appropriate hourly rate with respect to the plaintiffs' lead counsel. At the District Court level, a claim had been made for $125.00 per hour for services of lead counsel. The District Court had reduced this claim to $75.00 per hour. The Court of Appeals accepted the $125.00 per hour rate for trial time but reduced the claim to an $80.00 per hour base rate (increased by a 10 per cent contingency factor) for non-trial time.

It is difficult to imagine how the Court of Appeals could have held the $75.00 hourly rate of the District Court to be clearly erroneous or an abuse of discretion and then returned *sua sponte* to an $80.00 base rate for portions of these same services.

The entire handling of the separate fee application shows an approach to the subject of attorneys' fees which is at odds with all normal standards of appellate review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition For Writ Of Certiorari should be granted to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies each of the foregoing Petition for Writ of Certiorari have been served on the following attorneys, by forwarding said copies by United States mail, postage prepaid, to their respective business addresses, this the 15 day of April, 1980:

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